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Mr Justice Clifford

SUPREME COURT OF THE UNITED STATES.

No. ~~280~~. ~~148~~. 41.

WILLIAM GLASGOW, Jr., AND WILLIAM C. TAYLOR, SURVIVING COMMISSIONERS OF THE 16th SECTION IN TOWNSHIP 45 NORTH, OF RANGE 7 EAST, PL'FFS IN ERROR,

vs.

JOHN B. HORTIZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Affirmed

G. S. Gideon, Printer, 511 Ninth street, Washington.

23 Miss 539

2 Pet 287

Act 20 Dec 1803

also 2 Pet 298

Jus Grier

SUPREME COURT OF THE UNITED STATES.

No. 280.

WILLIAM GLASGOW, Jr., AND WILLIAM C. TAYLOR, SURVIVING COMMISSIONERS OF SIXTEENTH SECTION, IN TOWNSHIP FORTY-FIVE NORTH, OF RANGE SEVEN EAST, PLAINTIFFS IN ERROR,

vs.

JOHN B. HORTIZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

[L. S.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at March term, A. D. 1859, between William Glasgow, jr., and William C. Taylor, surviving commissioners of 16th section, in township 45 north, of range 7 east, plaintiffs, and John B. Hortiz, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this 10th day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri District.

Allowed by William Scott, presiding judge of the supreme court within and for the State of Missouri, this 23d June, 1859.

WILLIAM SCOTT.

THE STATE OF MISSOURI, *ss.*

I, William S. Glanville, clerk of the supreme court of said State, held at St. Louis, certify to the Supreme Court of the United States herewith a full, true, and complete transcript of the record and proceedings of the said court in the case of William Glasgow, junior, and William C. Taylor, surviving commissioners of the

16th section, township 45 north, range 7 east of the 5th principal meridian, against John B. Hortiz, as fully as the same remain of record and on file in *in* my office.

In testimony whereof, I hereto set my hand and the seal of said court at office in St. Louis, this 20th day of August, A. D. eighteen hundred and fifty-nine. [SEAL.]

WM. S. GLANVILLE, *Cl'k.*

Writ of Error.

THE STATE OF MISSOURI, *ss.*

Be it remembered, that on the 19th day of February, in the year 1858, there issued from the office of the clerk of the supreme court of said State, held at St. Louis, a writ of error, in words and figures as follows:

THE STATE OF MISSOURI, *ss.*

The State of Missouri to the honorable the St. Louis land court in said State, greeting:

Whereas in the record and proceedings in a certain cause lately pending in the St. Louis land court, wherein William Milburn and others, commissioners of the 16th section, are plaintiffs, and John B. Hortiz is defendant, in a civil action, manifest error hath intervened, to the great damage of said plaintiffs, as by their complaint we are informed: Now, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid in that behalf, command you, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said court, so that we may have them before us at our supreme court, to be begun and held in the city of St. Louis, in the county of St. Louis, in said State, on the third Monday in March next, so that our judges of our supreme court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

Witness William S. Glanville, clerk of our supreme court, at office in the city of St. Louis, this 19th day of February, in the year of our Lord one thousand eight hundred and fifty-eight.

WILLIAM S. GLANVILLE, *Clerk.*

Return on Writ of Error.

Said writ was duly returned endorsed as follows, to wit:

STATE OF MISSOURI,
County of St. Louis, ss.

In obedience to the command of the within writ, I, Charles A. Mantz, clerk of the St. Louis land court, within and for the county aforesaid, certify the foregoing [following] to be a true and correct copy of the record and proceedings (as required) had in the cause of William Milburn and others, commissioners of the sixteenth section, plaintiffs, against John B. Hortiz, defendant in error, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of the St. Louis land court, at office in the city of St. Louis, this 24th day of February, 1858.

[SEAL.]

CHARLES A. MANTZ, *Clerk.*

Notice.

Accompanying said writ when returned was a notice in words and figures as follows:

William Milburn and others, commissioners, &c.,
vs.
John B. Hortiz.
} In St. Louis Land Conrt.

The above named defendants will take notice that a writ of error in the above entitled cause has been sued out to the supreme court by the plaintiffs, returnable to the next term, on the 3d Monday of March, at St. Louis.

Feb'y 22, 1858.

R. M. FIELD,
For Plaintiffs.

Accepted Feb'y 23d, 1858.

A. TODD,
Att'y for Defendant.

The transcript returned with said writ of error from said land court is in words and figures as follows:

State of Missouri,
County of St. Louis, ss.

Be it remembered, that on the 15th day of September, in the year of our Lord 1853, there was filed in the office of the clerk of the St. Louis land court a petition, which is in words and figures as follows:

Petition.

In St. Louis Land Court, October Term, 1853—St. Louis County.

William Milburn, William Glasgow, Jr., and William C. Taylor, commissioners of the 16th section of township 45 north, range seven east, Plaintiffs,
against
John Baptiste Hortiz, Defendant.

The plaintiffs state that, on the eleventh day of April, 1851, they were duly appointed commissioners, as aforesaid, by the St. Louis county court, pursuant to the provisions of an act entitled "An act to authorize the sale of fractional section sixteen, township forty-five north, range seven east," approved March 3d, 1851; that as such commissioners, the plaintiffs were on the first day of January, 1853, lawfully entitled to the possession of that tract of land situate in St. Louis county, known and described as the fractional section sixteen, of township forty-five north, and range seven east, according to the surveys of the public lands of the United States, and still continue so entitled. That afterwards, on the 2d day of January, 1853, the defendant had entered into said tract of land, and enclosed with fences about ten acres, parcel of said sixteenth section, and still unlawfully withholds the possession of such tract from the plaintiffs, to their damage one hundred dollars.

The plaintiffs pray judgment for the possession of said parcel of land, and for their damages aforesaid, and for damages for the detention thereof, till the possession be delivered to them.

By their attorneys,
FIELD, WILLIAMS & BATES.

Barton Bates, attorney for the plaintiffs, being duly sworn, on his oath says that he believes the foregoing petition and the matters therein, as stated, to be true.

BARTON BATES.

Sworn to and subscribed before me, this 15th September, 1853.
CHARLES A. MANTZ, *Clerk.*

Summons.

Upon the filing of the above petition, the clerk issued to the sheriff of St. Louis county a summons in the words and figures following, to wit:

The State of Missouri to the Sheriff of St. Louis County, greeting:

We command you to summon *Joseph* Baptiste Hortiz to appear before the judge of our St. Louis land court on the first day of the next term thereof, to be held at the city of St. Louis, within and for the county of St. Louis, on the first Monday of October next, then and there to answer the complaint of William Milburn, William Glasgow, jr., and William C. Taylor, commissioners of the sixteenth section of township forty-five north, range seven east, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles A. Mantz, clerk of our *our* said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this 15th day of September, A. D. 1853.

[SEAL.]

CHARLES A. MANTZ, *Clerk.*

Sheriff's Return.

Upon which summons the sheriff made return in the following words, to wit:

Executed this writ in the county of St. Louis, on the 17th day of September, 1853, by delivering to the within defendant, J. B. Hortiz, a copy of the within writ and petition as furnished by the clerk.

JNO. M. WIMER, *Sheriff.*
By J. G. BLAKEY, *Deputy.*

Answer of Defendant.

Afterwards, on the 13th day of October, 1853, an answer to said petition was filed in this cause, which is in words and figures as follows:

John B. Hortiz, the above defendant, answers and says, that he has no knowledge as to the appointment of plaintiffs, as named, to be commissioners, at the time and by the court stated by them in their petition, pursuant to an act referred to in said petition.

This defendant is in possession of a tract of land, containing four arpens and $\frac{22}{100}$, situate in the Grand Prairie, being one arpent in width by four and $\frac{22}{100}$ arpens in depth, bounded on the east by the eastern line of the Grand Prairie, and lying immediately south of a tract claimed by William Hangel, under Jacque Marechell, which may be a part of the land claimed by plaintiffs in their said petition. This is the only tract, and all the land in the possession of said defendant in the Grand Prairie, or within the said fractional sixteenth section mentioned by plaintiffs.

Defendant denies that the plaintiffs are entitled to the possession of the above named tract of four arpens and $\frac{22}{100}$.

P. C. MOREHEAD,
Att'y for Def't.

John B. Hortiz, the above defendant, states on oath, that the above answer and the matters as therein stated are true, he believes.

JNO. B. HORTIZ.

Sworn to and subscribed before me, this 13th day of October, 1853.

CHARLES A. MANTZ, *Clerk.*

Thereafter this cause was continued from time to time, until Monday, November 23d, 1857, when the following proceedings were had herein, to wit:

Judgment.

In St. Louis Land Court—October Term, 1857.

WILLIAM MILBURN, WILLIAM GLASGOW, JR., and William C. Taylor, commissioners of 16th section, township 45 north, range 7 east, Plaintiffs, vs. JOHN B. HORTIZ, Defendant.	

Now, at this day, come said parties, by their respective attorneys, and thereupon come also a jury, to wit, Charles Lambert, John P. Hussey, John H. Meyers, William Hall, August Shipper, William A. Moore, W. L. F. Gage, Henry Bergman, C. L. Carpenter, John King, J. P. Helfenstein, and Henry B. McGill, twelve good and lawful men, who being duly elected, tried, and sworn, well and truly to try the issue joined between the parties herein, and a true verdict render, according to the evidence, therefore the trial progressed; and being fully terminated, the jury, as aforesaid, on their oaths aforesaid, find for the defendant. It is, therefore, upon the finding of the jury, as aforesaid, ordered and adjudged by the court, that the plaintiffs take nothing by their suit, but that the defendant go hence without day, and recover of said plaintiffs his costs and charges herein expended, and have execution therefor.

Motion for a new Trial Overruled.—Bill of Except's filed.

And afterwards, on the same day, the plaintiffs again come by their attorneys, and file herein a motion for a new trial, and submit the same to the court, and the court having heard and being fully advised of and concerning the premises, doth order and adjudge that said motion be overruled. And thereupon said plaintiffs file their bill of exceptions, which is in words and figures as follows, to wit:

Bill of Exceptions.

This case was tried by a jury on the 23d day of November, 1857. On the trial the plaintiff gave in evidence the act of Congress approved March 6th, 1820, entitled "An act to authorize the people of the Missouri Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and to prohibit slavery in certain Territories." Also the ordinance of the people of the State of Missouri, passed in convention on the 19th day of July, 1820, accepting the terms proposed in said act of Congress.

And also an act of the general assembly of the State of Missouri, approved March 3d, 1851, entitled "An act to authorize the sale of fractional section sixteen, township forty-five north, range seven east."

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Appointment of Commissioners.

The plaintiffs then read in evidence the record of the St. Louis county court, appointing the plaintiffs commissioners under the last mentioned act as follows:

In the St. Louis County Court, April 11th, 1851.

State of Missouri,
County of St. Louis, ss.

The court appoint William Milburn, William Glasgow, jr., and William C. Taylor, commissioners to take possession of section number sixteen, township forty-five north, range seven east, and to sell the same, or any part thereof, on such terms and in such manner as the court shall hereafter direct. The said commissioners having all the powers and subject to all the restrictions of the act of the general assembly of the State of Missouri, entitled "An act to authorize the sale of fractional section sixteen, township forty-five north, range seven east," approved 3d March, 1851.

State of Missouri,
County of St. Louis, ss.

I, Josiah Thornburg, clerk of the county court within and for the county aforesaid, hereby certify that the foregoing is a true copy from the record of said court in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court at office, in the city of St. Louis, this 29 day of September, A. D. 1857.

JOSIAH THORNBURGH, *Clerk.*

Field-notes Brown's Survey Sec. 16.

The plaintiffs then read in evidence the field-notes of Brown's survey of fractional section 16, as follows:

Field-notes section 16, T. 45 N., R. 7 east.

From a point in widow Camp's N. boundary, 15.75 westerly of Pettier's west line, where set a post, from which a b. o. 3 in. diam. bears north 39 west, 58 l.; and a do. 3 in. dia. bears S. 19 W., 100 l.; N. between secs. 15 and 16, T. 45, R. 7 E., 9.53, set ¼ sec. post, from which a w. o. 3 in. dia. bears N. 2 E., 25 l.; and a do. 3 in. dia. bears N. 89 E., 21 l.; 29.53, the west edge of a pond, 2 chs. wide; 49.50, set post corner to secs. 9, 10, 15 and 16, in a mound; west, between secs. 9 and 16, T. 45 N., R. 7 east; 40.00 set ¼ sec. post, in a hazel thicket; 80.00 set post, corner to secs. 8, 9, 16 and 17, in a hazel thicket, mound; land lies well; good soil, under g'th, hazel and bushes; south, between secs. 16 and 17, T. 45 N., R. 7 east; 40.00 set ¼ sec. post, in mound; 42.00 a branch 5 l. wide bears southerly; 44.00 left branch bearing S. E.; 51.00 a spring branch bears east; 57.69 intersected E. Yoste's 80 arpt. tract; 7 chs. W. of his N. E. corner on Chouteau, set stone; land gently rolling prairie.

Office of Surveyor General
for Illinois and Missouri,
St. Louis, October 9th, 1857.

The above is a correct copy from book 23, and pages 180 to 183, of the field-notes of Missouri surveys on file in this office, of the original field-notes of the lines between secs. 16 and 15, and 9 and 16, and 16 and 17, of township 45 north, range 7 east, of the 5th principal meridian, as said lines were surveyed in 1818, by Jos. C. Brown, under contract of 31 March, 1817.

JNO. LOUGHBOROUGH,
Surveyor General.

Survey of Out-boundary.

The plaintiffs then exhibited in evidence an authentic copy of plat of township 45 north, range 7 east, certified by the surveyor general of Illinois and Missouri, June 17th, 1845, and an authenticated plat and description of the survey of the out-boundary of the town of St Louis, as established by the surveyor general.

Agreement.

It was agreed between the parties that authenticated copies of the foregoing township and out-boundary plats from the office of the surveyor general, or the General Land Office at Washington, may be used before any appellate court to which this case may be carried, with like effect as if the same were set forth in this bill of exceptions at large.

Admission.

The defendant admitted that the land in controversy lay without the exterior limits of said out-boundary survey.

The defendant further admitted that at the commencement of this suit he was in possession of a part of said sixteenth section as stated in his answer. The plaintiffs then rested.

Defendant's case.

On behalf of the defendant evidence was given tending to show that the land in possession of the defendant, and now in controversy, was a part of a lot of ground forty arpens in length, by one arpent in width, and which lot was one of a series of lots of like length, and of widths varying from one to two arpens, lying adjacent to each other, and in the same general range, and in the vicinity of the ancient village of St. Louis, and that said lots were cultivated by one Francois Bequette, prior to December 20th, 1803, claiming the same to be his, and that while he cultivated the same he was an inhabitant of said village, and that he died there, and that defendant is one of his heirs, and thus derived title to this land.

Objection.

To the giving of said evidence the plaintiffs duly objected, on the ground that the said lot was situated beyond the said out-boundary line; but the court overruled the objection, and admitted the evidence, to which decision of the court the plaintiffs duly excepted.

No further evidence was given on either side.

Instructions asked by Pl'ffs.

The plaintiffs requested the court to give to the jury each of the following instructions:

1. The jury are instructed that the several matters of proof adduced by the plaintiffs, if genuine, are effectual to show that the title to the land in dispute was vested in the State of Missouri on the 19th day of July, 1820, and that the same title has become vested in the plaintiffs. (Refused.)

3. The jury are further instructed, that the survey of the out-boundary read in evidence is to be considered by them as the official and authoritative survey of the out-boundary directed to be run by the act of Congress of the 13th of June, 1812, binding on all parties claiming a confirmation by force of the first section of said act, and that all the evidence adduced by the defendant to show that the lot of Bequet was situated on the land in controversy outside of the out-boundary, as marked by such survey, ought to be disregarded by the jury. (Refused.)

But the court refused to give them, or either of them, and to such refusal the plaintiffs duly excepted.

Instruction given for the Defendant.

At the request of the defendant the court gave the following instruction:

If the jury believe from the evidence, that the land shown to be in possession of the defendant, and sued for in this case, is part of a lot, one of a series of lots lying adjacent to each other in the same general range, and in the vicinity of the ancient village of St. Louis, now city of St. Louis, in the State of Missouri, and that said lots were cultivated by the inhabitants of said village in a common-field prior to December 20th, 1803, and that the land sued for in this case was cultivated and claimed by Francis Bequette, junior, prior to said time, and that he was an inhabitant of said village when so cultivating it, and that defendant derives his possession thereto from or through said Bequette, they should find for the defendant.

To the giving of which the plaintiffs duly excepted. The jury found a verdict for the defendant.

Motion for New Trial Overruled.

Within four days the plaintiffs made the following motion for a new trial, to wit:

The plaintiffs move the court to set aside the verdict in this case, and grant a new trial, because—

First. The court admitted illegal evidence to be given to the jury on behalf of the defendant.

Second. The court misdirected the jury in matters of law arising on said trial.

FIELD.

The court overruled the motion, to which decision of the court in overruling said motion the plaintiffs duly excepted.

Agreement.

It is agreed that the public acts referred to in the foregoing bill of exceptions may be made use of, and read in any appellate court from any printed copy thereof published by authority, and that the amount in controversy in this suit exceeds two thousand dollars. Exceptions allowed.

C. B. LORD.

STATE OF MISSOURI,
County of St. Louis, ss.

I, Charles A. Mantz, clerk of the St. Louis land court within and for said county, certify the foregoing transcript to be a true and correct copy of the record and proceedings had (as required) in the case of William Milburn & others, plaintiffs, and John Baptiste Hortiz, defendant, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of our said court at office, in the city of St. Louis, this 19th day of February, 1858.

[SEAL.]

CHAS. A. MANTZ, *Clerk.*

Suggestion of Death and Motion for Rule.

Afterwards, in said Supreme Court, at the March term, 1858, the following proceedings were had in this cause, to wit:

The said William Glasgow, jr., and William C. Taylor come now and suggest, that since the return of the writ of error in this cause, and before assignment of errors herein, the said William Milburn has departed this life, and they now move this court to grant a rule upon the above mentioned defendant in error, to show cause on the first day of the next term of this court, or as soon thereafter as counsel can be heard, why the writ of error in this

case should not be prosecuted in the name of the survivors, said Glasgow and Taylor.

R. M. FIELD,
For Comm'rs. with Messrs. Bates.

Motion Sustained and Rule Ordered.

Which said motion was sustained and a rule ordered by the court, and the cause continued until the next term.

Rule on Def't to show Cause, &c.

Thereafter, on the 3d day of September, 1858, there issued from the office of the clerk of said court a rule in words and figures as follows:

THE STATE OF MISSOURI, *ss.*

The State of Missouri to the Sheriff of St. Louis county, in said State, greeting:

Whereas, in the case of William Milburn, William Glasgow, jr., and William C. Taylor, commissioners of the sixteenth section, township forty-five north, range seven east, plaintiffs in error, against John B. Hortiz, defendant in error, it has been suggested to our supreme court of said State at the March term, 1858, that since the return of the writ of error in said cause into said supreme court, and before an assignment of errors had been filed in the same, the said William Milburn has departed this life: These are, therefore, to command you, that you summon John B. Hortiz, said defendant in error, to be and appear before our said supreme court on the first day of the next term thereof, to be begun and held at the court-house, in the city of St. Louis, on the third Monday in October next, to show cause, if any he have, why the writ of error in the aforesaid cause should not be prosecuted in the name of the surviving plaintiffs in error, the said William Glasgow, jr., and the said William C. Taylor. And have you then there this writ, with your return endorsed thereon.

In testimony whereof, I hereto set my hand and the seal of said [SEAL.] supreme court at office, in the city of St. Louis, this 3d day of September, A. D. 1858.

WM. S. GLANVILLE, *Clerk.*

Said writ was duly returned, endorsed as follows, to wit:

Executed this writ in Saint Louis county, on the 9th day of September, 1858, by delivering a copy of the same, as furnished by the clerk, to John B. Hortiz.

M. S. CERRE, *Sh'ff.*
By GEO. N. STEPHENS, *D. S.*

Appearance of Defendant.

Thereafter, at the October term, 1858, the defendant in error

appeared by his attorney, and consented that this cause be revived and prosecuted in the name of the surviving commissioners, the said William Glasgow, junior, and the said William C. Taylor.

And thereupon the plaintiffs in error file an assignment of error herein, as follows, to wit:

And now come the said surviving plaintiffs in error, and say, that in the record of the proceedings and judgment in this case, it does manifestly appear that the court below committed the following errors:

1. In admitting illegal evidence to the jury on the part of the defendant below.
2. In refusing apt and proper instructions to the jury moved on behalf of the plaintiffs below.
3. In giving to the jury improper and illegal instructions to the great prejudice of the plaintiffs below.
4. In rendering judgment for the defendant below, instead of rendering the same for the plaintiffs below.
5. In various other particulars patent on the record.

Wherefore, the plaintiffs in error pray that the judgment below may be reversed, and that they may be restored to their just rights, &c. By their attorneys,

FIELD & BATES.

Thereupon, by consent of parties, this cause was continued until the next term. And at the March term, 1859, the defendant joined in error, as follows:

Said defendant comes and says, as to the errors severally assigned by the plaintiffs in error, that there is no error in any of said supposed errors so by the plaintiff severally averred.

Filed 13th March, 1859.

P. C. MOREHEAD,
For Deft. in Error.

Afterwards, during said March term, 1859, the parties again appeared by their attorneys, and argued this cause and submitted it to the court for decision.

Judgment of Sup. Court.

Afterwards, and during said March term, 1859, to wit, on the 27th day of May, 1859, the court rendered judgment in this cause, which is in words as follows, to wit:

WILLIAM GLASGOW, Junior, and WILLIAM C. TAYLOR, commissioners of the 16th section, township 45 north, range 7 east, of the 5th principal meridian, Plaintiffs in Error, vs. JOHN B. HORTIZ, Def't in Error.	Error to Saint Louis Land Court.

Now at this day came again the parties herein, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid by said land court rendered, be in all things affirmed and stand in full force and effect. And it is further considered and adjudged by the court, that said defendant in error go hence, and recover against said plaintiffs in error his costs and charges herein expended, and have execution therefor.

Opinion of Sup. Court.

And on rendering said judgment the court gave a written opinion in said cause, which is in words and figures as follows, to wit:

The record in this case presents the single point, touching the conclusiveness of the out-boundary surveys, against any proof of common-field lots not embraced within it; and the case will therefore be disposed of in conformity to previous decisions on this point. Judgment affirmed, the other judges concurring.

W. B. NOPTON.

Bond on Writ of Error to U. S. Sup. Court.

Afterwards, on the 23d of June, 1859, a bond was filed in this cause in words and figures as follows:

Know all men by these present, that we, James A. Rogers and R. M. Field, are held and firmly bound unto John B. Hortiz, in the just and full sum of five hundred dollars, to be paid to the said John B. Hortiz, his executors, administrators, or assigns, to which payment well and truly be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 23d day of June, in the year of our Lord one thousand eight hundred and fifty-nine. Whereas lately, at the March term, 1859, of the supreme court of the State of Missouri, in a suit depending in said court between William Glasgow, jr., and William C. Taylor, surviving commissioners of 16th section, in township 45 north, of range 7 east, plaintiffs, and John B. Hortiz, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear to a Supreme Court of the United States, to be holden at Washington the first Monday of December next: Now the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

JAS. A. ROGERS, [SEAL.]
R. M. FIELD. [SEAL.]

Approved by William Scott, presiding judge of the supreme court, within and for the State of Missouri, this 23d day of June, A. D. 1859.

WILLIAM SCOTT.

THE STATE OF MISSOURI, *ss.*

I, William S. Glanville, clerk of the supreme court of said State, held at St. Louis, certify that the foregoing is a full, true and complete transcript of the record and proceedings of said court in the case of William Glasgow, junior, and William C. Taylor, surviving commissioners of 16th section, township 45, range 7 east, plaintiffs in error, against John B. Hortiz, defendant in error, as fully as the same remain of record and on file in my office.

[SEAL.] In testimony whereof, I hereto set my hand and the seal of said court, at office in Saint Louis, this twentieth day of August, A. D. 1859.

WM. S. GLANVILLE,
Clerk.

Filed 9th Dec., 1859.

Citation.

The United States of America to John B. Hortiz, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein William Glasgow, jr., and William C. Taylor, surviving commissioners of 16th section, in township 45 north, of range 7 east, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Scott, presiding judge of the supreme court of the State of Missouri, this 23 day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

WILLIAM SCOTT.

I acknowledge service of the within upon the defendant, John B. Hortiz, this 26th day of October, A. D. 1859, at St. Louis, Mo.

A. TODD,
Att'y for Hortiz.

Assignment of Errors.

In the Supreme Court of the United States—Dec'r Term, 1859.

William Glasgow, Jr., and William C. Taylor, surviving Commissioners, &c., Plaintiffs in Error,
vs.
John B. Hortiz, Defendant in Error.

And now come the plaintiffs in error, and say that for causes of error in the judgment and proceedings below, they assign the following, viz:

1. The court below admitted improper and illegal evidence to the jury, in prejudice of the rights of the plaintiffs, and notwithstanding their objections to the same.
2. The court below gave improper and illegal instructions to the jury, to the prejudice of the plaintiffs in error.
3. The court below refused proper and legal instructions to the jury, moved on behalf of the plaintiffs in error.
4. The court below gave judgment for the defendant in error, whereas it manifestly appears from the record that judgment should have been given for the plaintiffs.

Wherefore the plaintiffs pray for a reversal of the judgment, and to be restored to their just rights.

By their attorney,

L. G. PICOT.

20 Dec 1803 when flags
changed — Spanish to American
in Upper Louisiana —
10 March 1804 flags
officially changed
Spanish then [illegible]
[illegible] 1804 — 2 act
26 March 1804
1805 — 3 Dec 1806 —
March 3 1807 2 section
[illegible] donation grants —
March 3 1811 — [illegible]
[illegible] June 25 1812
10 section [illegible]
[illegible] 1813 March 3 — [illegible]
[illegible] 1814 [illegible]
7 1815 — [illegible]
[illegible] to donation [illegible] —
March 6 1820 — May 26 1824

SUPREME COURT OF THE UNITED STATES.

No. 41.—DECEMBER TERM, 1861.

WM. GLASGOW, JR., ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN B. HORTIZ, DEFENDANT IN ERROR.

ALSO,

No. 42.—THE SAME	vs.	CHAS. J. CARPENTER.
No. 43.	"	vs. ELZEAR BLANCHARD.
No. 44.	"	vs. JOHN HOGAN.
No. 45.	"	vs. JAMES A. HARDY.
No. 46.	"	vs. CHRISTO. McCLURE.

ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR PLAINTIFFS IN ERROR:

By EDWARD BATES.

These six cases are all alike; for, although they differ from each other in some minor particulars, yet, as far as the plaintiffs are concerned, they all depend upon one single question of law, the determination of which, for or against the plaintiffs, must conclude their rights in all the cases.

The first case—that of Hortiz, No. 41—is the leading case, and the only one fully stated in the Missouri Reports. (See 23 Mo., 532.) The other five cases do but follow, and depend upon that.

It is an action of ejectment for the possession of a part of fractional section No. 16, of T. 45 north, range 7 east, of the fifth principal meridian, which is situate very near to the city of St. Louis, according to its present enlarged limits, and was conducted in the usual form of such actions, according to the practice in Missouri, and resulted in a final judgment against the plaintiffs, who bring the case here, by writ of error.

The plaintiffs claim the land as special commissioners, appointed under a law of the State of Missouri, to take, hold, and sell the said fractional section of land, for the use of schools in the said township No. 45. And the links in the chain of title are the following:

1. The act of Congress (the Mo. enabling act, so called) of March 6, 1820. (3 Stat., 545): The fourth section of that act presents propositions, five in number, to the new State, which the State accepted, and thereby became a *purchaser, for valuable consideration,* of section 16 in each township, for the use of schools in the townships respectively. The acceptance was by ordinance of the convention of July 19, 1820; and thus, upon that day, the title to section 16 vested in the State, unless there was then outstanding a paramount title against the United States.

2. The legislature of Missouri passed an act, March 3, 1851, to authorize the sale of fractional section 16, T. 45 N., R. 7 E., specifically, and directed commissioners to be appointed for that purpose.

3. In pursuance of that act, the county court of St. Louis county appointed the plaintiffs such commissioners; and this is their title.

The defendant, Hortiz, claims that he is entitled to a portion of the land—4.22 arpents—within the said fractional section sixteen, by paramount title; that is, by confirmation of a common field lot in the Grande Prairie, belonging to the town of St. Louis, by force of the act of Congress of June 13, 1812; and this is the defendant's title.

As the land lies outside of the out-boundary of the town of St. Louis, and as neither party seems to deny the regularity of the title claimed by the other, so far, at least, as concerns the proof of the facts which go to constitute those titles respectively, it remains only to try the relative strength of their claims, and so determine which has the better title; and to that end, it seems to me that the whole matter may be disposed of by determining one single question of law; that is, is it competent for the defendant, Hortiz, to prove title to a lot, under and by force of the act of 1812, which lot is situate outside of the out-boundary of the town of St. Louis, as surveyed under the act of 1812? The plaintiff *denies,* and the defendant *affirms* this proposition; and I risk the cause of the plaintiffs upon the legal propriety of sustaining the *negative.*

The title of the plaintiff, standing alone, is unquestionable; and, in fact, is not questioned. It can only be invalidated by setting up the adverse title of the defendant; and, therefore, I have only to show the insufficiency of the defendant's title. And herein—

1. The act of 13th June, 1812: Its origin, history, and object. It was passed as a final disposition of the land claims of Missouri;

and, as a finality, was intended to be liberal, beyond the requirements of justice. (For the origin of the act, see Gales & Seaton's Pub. Doc., vol. 2, p. 450–1, with the letters of Thos. F. Riddick and others. And see my own brief, in Hammond vs. St. Louis Pub. Schools, 8 Mo. R., 69.)

The object of the act was to close up the land business of the towns of Upper Louisiana, and to make a liberal provision for the education of the people. But, unfortunately, it was not drawn with sufficient clearness of thought or precision of language, and was itself a novelty in Congressional legislation, being, as I suppose, the first act that confirmed land titles by its own vigor, and without the aid of subordinate agents.

Therefore, it becomes necessary to analyze and criticise the language of the act, in order to get at its true meaning.

The first section of the act confirms to the inhabitants of the towns named their *rights*, *titles*, or *claims* to *town lots*, *out-lots*, and *common-field lots*, in, *adjoining*, or *belonging to* the *towns* respectively, "which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803."

1. What did this act confirm? Certainly, *rights*, *titles*, and claims, and nothing else. I am aware that many persons have been misled by an unlucky phrase in an argumentative opinion of Judge Napton, in Page vs. Scheibel, 11 Mo. R., 183, to the effect that the act of 1812 did not confirm the concession or the claim, but the *lot*, and that upon the sole ground of *possession* prior to the 20th of December, 1803. This, it may be said, is only a verbal error; but it has been allowed to touch the substance of the act, to stimulate the activity of speculative claimants under old, temporary possessions, without right or title, and, in fact, to give tone and color to many subsequent decisions.

2. *Rights*, *titles*, and *claims*—What are they? The two first, rights and titles, perhaps, need no comment; but the word *claim* may have different meanings, according as it is used in its generic or its legal sense. This court, in Prigg vs. Pennsylvania, 16 Pet. R., 615, adopts two different definitions: 1. "It is, in a just and judicial sense, a demand of some matter of right, made by one person upon another, to do or to forbear to do some act or thing or matter of duty." 2. "A claim is a challenge of the property or ownership of a thing which he has not in his possession, but which is wrongfully detained from him."

And the supreme court of Missouri, in McKay vs. Dillon, 7 Mo. R., p. 14, speaking expressly of land claims, says: "A mere claim, unsupported by a shadow of right, is not such as any act of Congress could confirm. It embraces every species of proprietary interest set up against the government, whether founded on concession, grant, usage, or any other inchoate title by which, under the laws and customs of the Spanish government, property could be severed from the King's domain, and equitable titles created."

3. Confirmation—What is it? It is always relative, for it always refers to something antecedent, to some "concession, warrant, or order of survey," (in the language of several confirming acts of Congress,) to some "right, title, or claim" having a legal existence capable of confirmation. You cannot confirm a nullity. (Co. Litt. 295, b; Gilbert's Terms, 75–78; and see 15 John. R., 571, Murray vs. Riggs.) Still, a confirmation by the Government, (whether by act of Congress direct or by intermediary agents,) is a grant, as often determined by this court. (e. g. in Strother vs. Lucas, 12 Peters, 410; and Grignon vs. Astor, 2 How., 319.) Every confirmation is a grant, but every grant is not a confirmation—a sale by common entry is not.

4. A confirmation, by act of Congress direct, is of the same nature and legal effect as a confirmation by subordinate officers, who are empowered by act of Congress to confirm.

5. A confirmation, like every other grant, which fails to specify the quantity of land granted, the place and boundaries, is either void for uncertainty, or at least inoperative for the present, and cannot convey any particular land until some after act is done to ascertain and fix the thing granted.

The application of this doctrine is familiar in practice. In Missouri there are very many cases of confirmation by the board of commissioners, or the recorder of land titles, in which the locality of the land was unknown to the confirming power; and yet, the claim itself being found good, is confirmed; but the precise land to which the confirmation is to apply, must be ascertained by the future act of an executive officer. In such cases, the usual language of the act of confirmation is: "confirmed, to be surveyed." And I believe it is now the settled doctrine, both in Missouri and here, that such a confirmation attaches upon, and gives title to, no particular land until the precise locality is ascertained and fixed by survey. (See West vs. Cochran, 17 How. 403; 21 Curtis, 575.)

6. The survey of the out-boundary: The same first section of the act, after confirming the rights, titles, and claims of the inhabitants to lots, also directs the survey of the out-boundary lines of the town, (where it has not already been done,) and carefully directs it to be so done as to include the out-lots, common-field lots, and commons *thereto belonging*—that is, belonging to the *town*, not to individuals who happened to live in the town. The language of the act assumes that the town has an out-boundary, which has been, or ought to be surveyed. Congress knew that Spanish towns, such as St. Louis was, were municipal subdivisions of the county, having legal rights and obligations, as capable of definite limits, and as much needing them, as any district or county could be. (For the description of a Spanish provincial town, see White's Compilation of U. S. Land Laws, vol. 2, Appendix I, p. 36; and see the extracts of Spanish law, cited and approved by

this court, in New Orleans vs. U. States, 10 Pet. Rep., p. 724–6.)

This survey, then, (called map X,) is public in every particular. It was made by the Government and for the Government, and for the expressed and only purpose of marking the limits of a civil subdivision of the country. It is, therefore, not merely *prima facie* right, as some have supposed, but conclusive upon the Government and all the people—as binding to-day, as is the survey of the District of Columbia.

In this connection, I refer to the case of Trotter vs. The Public School Board, 9 Mo. R., 68. At page 81, the court says, (and I adopt the language word for word): "Congress designed to dispose of the whole subject-matter, about which they were legislating. When, therefore, they directed an out-boundary line to be run, *they obviously intended that survey to embrace all the particulars previously enumerated in the section;* and it was as clearly designed that these particulars, to wit: the village lots, out-lots, common-field lots, and commons, should comprehend everything within that line. Of what avail was this outboundary line, unless every thing within it was disposed of?" From this, it is clear, that then (1845) the supreme court of Missouri had not dreamed of the recent discovery, that the only object of the out-boundary directed by the *first* section of the act, was to limit the quantity of land reserved by the *second* section, for the use of schools *in the town!*

But, aside from these reasons of justice and policy, this survey is the only legal proof we have of the exact position and extent of the town of St. Louis. The law under which the survey was made, is positive that it must include all the lots confirmed; and it is a *legal presumption*, incapable of rebuttal, that it does include them all. He who claims the benefit of the act, must take it according to the act, and not otherwise.

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But there is another perfect answer to the claim of the defendant. The plaintiff has a perfect title to the land in question, of a dignity equal to the defendant's claim, and of older origin. Thus, the act of Congress of March 3, 1811, § 10, 2 Stat., p. 665, in providing for the sale of the public lands in the Territory of Louisiana, reserved section number sixteen in each township, for the support of schools within the same.

This was an appropriation of the land, if not a technical dedication to public use, so that the Government thereby became a trust-holder of the sixteenth section, and could not, if it would, by any honest and lawful means convey the title to another, any more than a private trustee can be allowed to destroy the right of his *cestui que trust*. There are many cases bearing upon this point, but I cite for the present only Cincinnati vs. White, 6 Pet. Rep., 431; New Orleans vs. The United States, 10 Pet. Rep., 662; and especially, as directly in point, upon the question of reservation and appropriation, the case of Wilcox vs. McConnell's lessee, 13 Peters R., p.

14 How 268 –

But the Government acted in good faith towards all parties. In 1812 it confirmed to the inhabitants of the town their town lots, out-lots, and common-field lots, and reserved the vacant lots for the use of schools, within the town; and directed the survey of the out-boundary of the town, so as to include them all. In 1818, it surveyed the sixteenth section, not as land belonging to the defendants, or any of them, but as public land, the title to which still vested in the Government, though pledged and appropriated to the beneficent object of education in the township. And, in 1820, it conveyed the land, by statutory contract, to the State of Missouri. And the State of Missouri, never doubting its title, by special act of assembly, passed on the 3d of March, 1851, authorized the sale of the lands for the support of schools in that township. And, these plaintiffs became commissioners for that purpose.

In addition to the suggestions of my own brief, I beg to refer the court to the brief of Mr. Field, (who was leading counsel below,) to be found in the report of this same case. (Milburn & al. vs. Hortiz, 23 Mo. R., 532.)

EDW'D BATES.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1861.

No.

WILLIAM MILBURN *et al.*, **Plaintiffs in Error,**

vs.

ELEAZAR BLANCHARD, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR,

BY T. POLK.

STATEMENT OF THE CASE.

THE premises sued for in this action, are a part of the sixteenth section, in township 45, range 7, east of the fifth principal meridian, lying in the county of St. Louis, in the State of Missouri. The plaintiffs claimed title by virtue of the act of Congress, approved the 6th of March, 1820, entitled "An Act to authorize the people of Missouri Territory to form a Constitution and State government, and for the admission of such State into the Union upon an equal footing with the original States, and to prohibit slavery in certain territories" (Brightly's Digest, 645); and of an ordinance of the people of Missouri, passed in Convention on the 19th day of July, 1820, entitled "An ordinance declaring the assent of the people of the State of Missouri, by their representatives in Convention assembled, to certain conditions and provisions of the aforesaid act of Congress, approved the 6th of March

1820." The plaintiffs gave in evidence an authenticated copy of the field notes of the survey of said section 16, made in 1818; also of the plat of said township 45; and also of the plat and description of the survey of the out-boundary of the town of St. Louis, as established by the Surveyor General of Illinois and Missouri, on the day of 1840.

It was admitted that the land in controversy lies outside of said boundary.

The defendant, who derived his title from François Faustin, dit Parent, claimed under the act of Congress of the 13th of June, 1812 (Brightly's Dig., 551), entitled "An act making further provisions for settling claims to land in the Territory of Missouri," which act he gave in evidence; and also the act entitled "An act supplementary to an act making further provision for settling claims to land in the Territory of Missouri," approved May 26th, 1824. Brightly's Dig., 552.

The defendant then offered in evidence the proceedings of Recorder Hunt, under the said act of the 26th of May, 1824, in respect to the claim of Faustin's legal representatives, This evidence was objected to by the plaintiffs, but it was admitted by the Court below, and the plaintiffs excepted.

Defendant then gave in evidence a document from the office of the Surveyor General, showing that said Recorder Hunt had returned to and filed in that office, a list of the claims that had been proved up before him under said act of 1824; and that this one of Faustin was one of the cases contained in said list, being a common-field lot in the Grand Prairie common fields of St. Louis, of two arpens in front by forty arpens in depth. Also a plat and description of the survey of said common-field lot, approved by the Surveyor General as U. S. survey, No. 1661. Also a confirmation certificate issued by the Recorder of Land Titles, upon the return to his office of said survey of said common-field lot, by the Surveyor General. To all these documents the plaintiffs also objected.

POINTS AND AUTHORITIES.

I. The out-boundary, which the principal deputy surveyor was required to survey and mark, was no part or condition of the grant made by the first section of the act of the 13th of June, 1812. Such out-boundary can neither limit, defeat, or in any manner modify the grant to the inhabitants of the villages enumerated, of the lots inhabited, cultivated or possessed by them.

The grant contained in this first section gave a full title, *proprio vigore*, to the inhabitants of the villages enumerated therein, to the lots inhabited, cultivated or possessed by them, on the day of its date, without any act to be done by them.

Vasseur vs. Benton, 1 Mo. R., 296.
Janis vs. Gurno, 6 Mo. Rep., 380.
Page vs. Scheibel, 11 Mo. R., 167.

This case of Page vs. Scheibel is strongly in point. In this, too, there was no out-boundary including the common field lot. It was also a common-field lot in the Grand Prairie common field, and outside of the out-boundary, as shown by the map X, as was the lot in this case. But the Court says: "It (the act of 13th June, 1812) confirms the title upon possession, inhabitation or cultivation alone." Also that "It (the act of 1812) was held to be a grant *proprio vigore*, and any further action on the part of the Government or the claimant, was but supererogatory, so far as the title was concerned."

And in the case of the City of Carondelet vs. the City of St. Louis, 25 Mo. Rep., 460, this Court says: "The act of 13th of June, 1812, was a complete divestiture of all the title of the United States; and nothing being reserved by the Government, nothing was required to be done by the confirmee."

The defendant in this case can employ no language stronger for his purpose than this. See, also,

Harrison vs. Page, 16 Mo., 182.
Kissel vs. Schools, 16 Mo., 553.
Gamache vs. Piquinot, 17 Mo., 310.
Soulard vs. Clark, 19 Mo., 583.
City of St. Louis vs. Tony, 21 Mo., 243.
Carondelet vs. St. Louis, 24 Mo., 31.
Guitard vs. Stoddard, 16 How., 494.
Gamache vs. Piquinot, 16 How., 451.
Savignac vs. Garrison, 18 How., 136.

II. The out-boundary was required to be run only for the purposes expressed in the second section of the act—that is, in order to ascertain the quantity and location of the land reserved by that section for the support of schools in the respective towns or villages.

1. The second section, in the first place, restricts the quantity of land reserved for the use of schools: it shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village.

2. And, secondly, the land reserved for the support of schools must lie *within the out-boundary required to be run.*

So that it is true, that *no land* was reserved for the support of schools which was not included within the out-boundary which it was made the duty of the principal deputy surveyor to survey and mark; but it is *not* true that *no lot* was confirmed to any inhabitant of the enumerated towns or villages, which was not included within such out-boundary.

What other purpose than the one above indicated could the out-boundary survey serve? It could answer no purposes of a survey to the private claimants, because it did not mark out the boundaries of their lots, nor ascertain their dimensions, nor settle their shapes, nor fix their localities. It did not even separate them from either the public lands or the lots of other private claimants.

It could answer no purpose of a public survey to the United States, except only that one above indicated. It could not even separate the confirmed lots, in mass, from the public lands, because there must necessarily have been public lands inside of the limits of such survey. For all the lots not inhabited, cultivated or possessed prior to the 20th of December, 1803, were public lands. And as such *public lands*, it was, that the act proposed to reserve them from confirmation for the support of schools.

III. It was enough to secure to the inhabitant the title to his lot under the act, that, in the first place, it should belong to one of the classes of lots enumerated in the first section—a town or village lot, out-lot, or common-field lot; and, in the next place, that he should have inhabited, cultivated or possessed it prior to the 20th December, 1803.

In respect to the character or situation of the lot, this section does not require it to be located within the out-boundary to be afterwards run, but only that it should be a town or village lot, out-lot, or common-field lot, in, adjoining or belonging to the town or village.

But the section does require that the out-boundary of the town or village shall be surveyed and marked so as to include the out-lots, common-field lots and commons thereto belonging.

So that, while the lots confirmed by the act are *not required* to lie within the out-boundary required to be thereafter run, that out-boundary *is required* to be run so as to include the town or village, and also its out-lots, common-field lots and commons. The title of the inhabitants to their lots is not dependent upon the running the out-boundary; but the running of the out-boundary is determined by the lots of the inhabitants, for it must be run so as to include them. If, therefore, the principal deputy surveyor, in surveying and marking the out-boundary of the town or village, failed to include therein all the out-lots or common-field lots, he violated his duty, and the out-boundary is not such as the act required it to be. And yet it is contended, that if he failed to include such lot, the title given by the act is lost to the inhabitant. If this construction of the law shall prevail, his violation of duty, instead of reflecting blame on the surveyor, is made to inflict upon the innocent inhabitant the penalty of the loss of his lot, when he had been guilty of nothing—neither criminality nor neglect. Nay, more: a penalty which he could not prevent or avoid by any forecast, diligence or counter-efforts.

One requisite that the lot must have, by the first section of the act of 1812—and only one—*does* have respect to its location—it must be either in, adjoining or belonging to one of the villages mentioned in the act. This is all that is required.

It is not necessary that it shall lie within the out-boundary which the principal deputy surveyor is required, afterwards, to survey and mark.

IV. The construction put upon the first section of the act of the 13th June, 1812, by plaintiffs' third instruction, would be correct, if it read thus: that the rights, titles and claims to town or village lots, out-lots, or common-field lots, and commons, in, adjoining and belonging to the several towns or villages of, &c., which lots have been inhabited, cultivated or possessed prior to the 20th December, 1803, *and which shall lie within the out-boundary hereinafter directed to be surveyed and marked*—shall be, and the same are hereby, confirmed, &c.

But such is not the reading of the section; and *no such interpolation* ought to be tolerated.

V. By the construction contended for by the plaintiffs, the inhabitants of the enumerated villages would hold their titles, not by the will of Congress, as expressed in the laws, but by the mere will and act of the principal deputy surveyor. He might determine—and that without appeal or correction—what lot should be confirmed, and what not.

It was certainly never the intention of Congress to make the titles of the inhabitants of these villages to their lots to depend upon the mere will or caprice of an inferior officer, in one of the executive departments of the Government.

VI. Again: by this construction of the act, no title could be vested by it in the inhabitants of the villages, until the out-boundary should be surveyed and marked; for, until then, it could never be known whether the lot came within the description of the act.

And in this very case of St. Louis, the out-boundary required by the act was never run until 1840; so that, under this construction, an inhabitant of St. Louis could get no title to a common-field lot before this date.

Yet it has been adjudged, in many cases, that the inhabi-

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tants of the towns and villages mentioned in the first section of the act, did get full titles by virtue of the act long before that date—that is, immediately upon the passage of the act.

Vasseur vs. Benton, 1 Mo. Rep., 296.
Lajoie vs. Primm, 3 Mo. Rep., 529.
Janis vs. Gurno, 4 Mo. Rep., 458.
Gurno vs. Janis, 6 Mo. Rep., 330.
Newman vs. Lawless, 6 Mo. Rep., 279.
Bird vs. Montgomery, 6 Mo. Rep., 510.
Biehler, *et al.*, vs. Coonce, 9 Mo. Rep., 347.
Mackrot vs. Dubreuil, 9 Mo. Rep., 477.
Montgomery *et al.*, vs. Lanusky, 9 Mo. Rep., 714.
Page vs. Scheibel, 11 Mo. Rep., 167.
Carondelet vs. St. Louis, 25 Mo. Rep., 448.
Funkhouser vs. Langkopf, 26 Mo. Rep., 453.

VII. In this case the land confirmed to Faustin by the first section of the act of 1812, has been surveyed and set apart to him by the United States. So that the same authority, to wit, the Executive branch of the Government, which has surveyed the out-boundary of the ancient town of St. St. Louis, so as *not* to include Faustin's common-field lot, has surveyed and set apart to him the lot in question, as the particular common-field lot confirmed to him by the act of 1812—saying thereby that the lot of which the *locus in quo* is a part, was confirmed to him by the act of 13th June, 1812, although it is not included within the out-boundary of St. Louis, as marked out under that act.

VIII. The act of 26th May, 1824, makes it the duty of the individual owners of lots confirmed to them by the act of the 13th of June, 1812, to designate and prove their lots before the Recorder of Land Titles, and the boundaries and extent of them. This duty was promptly discharged by Faustin. The act also made it the duty of the Recorder of Land Titles to issue a certificate of confirmation for each claim confirmed, and also to furnish to the Surveyor General a list of the lots so proved, to serve as his guide in distinguishing them from the vacant lots to be set apart for the support of schools. And all this was fully and strictly complied with by said Recorder. And the lot so proved by Faustin, and certified by the Recorder to have been confirmed to him under the act of 1812, has been surveyed and set apart to him by the Surveyor General. So that everything that could, by any possibility, be done by Faustin to perfect his title under the act of 1812, has been done. Can it be contended, then, with any show of reason or fairness, that he has lost his title, because an out-boundary has been so run as not to include his lot—and that, too, when such out-boundary is a matter to which he was an entire stranger, and was run fifteen years after he had made the proof required of him by the act of 1824?

Such out-boundary is no muniment of title to the individual claimant.

Milburn *et al.*, vs. Hortiz, 23 Mo. Rep., 532.

IX. The case of Milburn *et al.* vs. Hortiz, 23 Mo. 532, just referred to, is decisive upon this point. And the decision, in that case, has been followed up by the Supreme Court of Missouri in the case of Haydon *et. al.* vs. Hardman *et al.*, 23 Mo. R. 539.

So also, afterwards, in the case of Shultz vs. Lindell, 24 Mo. R. 567, that Court say: The act of the 13th June, 1812, confirms to individuals common-field lots, as well *without* the out-boundary as *within* it. And they reversed the judgment of the Land Court, because it had holden the contrary.

The case of the City of Carondelet vs. the City of St. Louis, 25 Mo. R., 448, rests upon the same principles. In that case the premises in dispute were claimed and sued for as a part of the Common of Carondelet, and they laid outside of the out-boundary, which had been surveyed and marked under the act of 1812, as including the village lots, out-lots, common-field lots and Commons of the village of Carondelet. And it was claimed, that the plaintiff had no right to recover for

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this reason. This point was distinctly made in the case. But it was over-ruled. The Court went further, and held that Carondelet was not even concluded by a United States survey of its Commons, unless such survey had been assented to and accepted by the inhabitants or their authorities.

The Court say: "But it is settled that confirmations, under the act of 1812, were legislative grants, without any conditions annexed, and that the act was operative to pass the title without anything further being done by the United States. If so, neither the Government, nor any department, nor officer under it, could impair the grant by an improper survey, or otherwise."

Indeed, in that case, the Court considered it as settled law, that a private claimant, under the act of 1812, is not concluded or prejudiced by any survey made for other claimants; and from this proceed to argue, that Carondelet was not concluded by the surveys offered in evidence against her in that case, one of which was the survey of her out-boundary; and the other, the survey of her Commons.

To the same effect is the case of Funkhouser vs. Langkopf, 26 Mo. R., 453.

X. The survey, No. 1661, of the confirmation to Louis Laroche and François Faustin, was legal and competent evidence in the cause for the defendant.

a It was in one form, and properly authenticated.

b The survey was an official, public survey of the Government of the United States. It was made under and by authority of the laws of the United States. The Surveyor-General of Illinois and Missouri was authorized and required to make it.

See act of Congress, 29th of April, 1816: Public Lands, Laws, Instructions and Opinions, &c., part 1, p. 278, § 1.

The first section of this act makes the duty of the Surveyor General, thereby ordered to be appointed, 1st, to survey the public lands; 2d, *to cause to be surveyed the lands in said Territories*, (of Missouri and Illinois,) the claims to which *have been, or hereafter may be, confirmed by any act of Congress, which have not already been surveyed according to law*, and generally, to do and perform all and singular the duties required by law to be performed by the principal Deputy Surveyor of the Territory of Missouri.

This act is full to the point—direct, peremptory, and even mandatory. It leaves no room for doubt or question.

The survey was also authorized by the act of the 26th of May, 1824.

See Public Lands, Laws, Instructions and Opinions, part 1, p. 397.

The 1st section of this act makes it the duty of the claimants of the town or village lots, out-lots, and common-field lots, in the villages therein mentioned, confirmed by the act of 13th of June, 1812, &c., to proceed, within eighteen months, to designate their said lots, by proving before the Recorder, the fact of inhabitation, cultivation, or possession, and the boundaries and extent of *each* claim—for what purpose? *so as to enable the Surveyor General to distinguish the* PRIVATE *from the vacant lots* appertaining to the said towns or villages.

I call particular attention to the following points in the aforesaid provision of this section.

1. The *Surveyor General* is the officer whose duty it is made to distinguish the private from the vacant lots.

2. This duty is imposed on him in his *official character* of *Surveyor General.* It is, therefore, his *official duty*, as such officer.

3. He is to distinguish the *private* from the vacant lots—not the *vacant* from the private lots. If the language had been —to distinguish the vacant lots, it might have been argued with some show of plausibility, that the law only required him to survey the *vacant* lots, and not the private ones, as he might have distinguished them from the private, by only sur-

veying the vacant lots. But it is not so. It requires him to distinguish the *private* from the vacant lots, and this he could not do without *surveying* the *private* lots.

And in order that the Surveyor General should so distinguish the private from the vacant lots, the boundaries and extent of EACH claim are required to be proved. From which it is evident, that he could not possibly distinguish the *private* from the vacant lots, as required by the law, without *making* a *survey* of *each* claim, marking the boundaries and extent."

To *distinguish* the *private* from the vacant lots in the sense of this law, is to *survey* the private claims—each one of them. It can mean nothing else. How else could the *private* be *distinguished* from the vacant lots? Besides, this *distinguishing* is to be made by an officer, whose duty, whose sole duty it was, to *make surveys*. The *Recorder* was onerated with the duty of receiving the proof, but the *Surveyor General* was onerated with the duty of *distinguishing* the private from the vacant lots.

Again, the 3d section of the act provides, that so soon as the eighteen months, limited in the 1st section, shall have expired, the Recorder shall furnish the *Surveyor General* with a *list* of the lots, so proved to have been inhabited, cultivated, or possessed, &c. But why *furnish this list to the Surveyor General*, if it was not in order that that officer might *survey* each claim contained in the list? It could be for no other purpose. It was that he might *survey* them and file such surveys in his office, and enter them upon the maps and plats that he was required by law to make and keep there—to enter them upon the township plats of the public surveys.

Still further, this list was to be so furnished the Surveyor General, for what purpose?—to serve as *his guide*. In doing what?—In *distinguishing* them, that is, the private lots from the vacant lots, to be set apart for the support of schools.

In the case of Gamache, vs. Piquinot, 17 Mo. R., 321, this

Court settles it, as I think, that the act of 1824, authorized this survey. They say, "the proceedings before the Recorder, *were to be the* basis for the action of the *Surveyor*, &c."

XI. But the survey was entirely unnecessary and supererogatory in the case. And as the admission of it in evidence, on the one hand, could have done the defendant no good, nor the plaintiffs, on the other hand, any harm, this Court will not reverse the judgment of the Court below for admitting it, even though it may have been in error to do it.

That the survey was unnecessary, is plain to be seen from the Record. Its only possible use, effect, or object was, to identify and designate the land cultivated and possessed by Faustin.

But it will be seen, by examining the confirmation certificate of the Recorder, given in evidence, that it contains as full, specific, minute and descriptive identification and designation of the lot so cultivated and possessed, as does the survey. It will also be seen, that the description of the lot, as contained in this certificate, is so complete and perfect, that it effectually sets apart Faustin's lot, and distinguishes it both from the public lands and also from the private, that any man, with this certificate in his hand, could readily point out the location, boundaries and extent of Faustin's land. And this was all that was required in this case for the jury, as well as all that was required by the act of the 26th of May, 1824.

XII. The records from the Recorder of Land Titles' Office, given in evidence by the defendant, were competent evidence in the case against these plaintiffs.

a As stated in regard to the survey, No. 1661, they were properly authenticated, were in due form, were from the proper office, and were made by an officer who was authorized by law to make and keep them.

Act of Congress of the 26th of May, 1824: Part 1, Public Lands, Laws, Instructions, Opinions, &c., p. 397.

b These records, although made under the act of the 26th of May, 1824, subsequent to the date when the plaintiffs' title incepted, proved a confirmation to the defendant's grantee, Faustin, of the date of the 13th June, 1812, eight years prior to the time when the plaintiffs claimed that their title began, which was on the 19th July, 1820.

The confirmation to Faustin was not on the day, nor of the date, when these records were made, nor of the date of the act of the 26th of May, 1824. Nor was it under or by virtue of the said act of the 26th of May, 1824; but it was under and by force of the act of the 13th June, 1812. The whole act of the 26th of May, 1824, and all its provisions, rest upon that idea. The act expressly so says.

The title of Faustin, certified to have been confirmed, by the certificate given him by the Recorder of Land Titles, to the land therein described, was a perfect title in him, on the 13th of June, 1812. The act of 13th of June, 1812, gave him his title, *proprio vigore*, and at the very instant of its passage.

Vasseur vs. Benton, 1 Mo. R., 296.
Lajoie vs. Primm, 3 Mo. R., 529.
Janis vs. Gurno, 4 Mo., 460.
Page vs. Scheibel, 11 Mo. R., 167.
Guitard vs. Stoddard, 16 How., 494.
Savignac vs. Garrison, 18 How., 136.

In the case of Janis vs. Gurno, the Supreme Court of Missouri say: It was, therefore, proper—speaking of the act of 26th May, '24—that Congress should provide means by which evidence of the facts, that is of inhabitation, cultivation, or possession, might be embodied and rendered durable. To the same effect is the case of

Newman vs. Lawless, 6 Mo. R., 279.

In the case of Montgomery vs. Lanusky, 9 Mo. R., 718, Judge Napton, delivering the opinion of the Court, says: "It has been settled long prior to this decision, that the act of 1812, *proprio vigore*, confirmed the lots to the respective claimants. The act of 1824 could not give any additional strength to the confirmation, for it was already a complete statutory grant, but merely provided a mode by which evidence of that grant could be obtained from the government. The certificate of the Recorder is merely evidence of a previous grant, &c."

And in Page vs. Scheibel, 11 Mo. R., 183, the Court says, in effect, as already stated, that the Hunt Records are documentary evidences of title under the act of 1812—evidences of a title which had previously emanated, that is, on the 13th of June, 1812. That the act of 1812 had been holden to be a grant, *proprio vigore*, and any further *action* on the part of the government or claimant was but supererogatory, so far as the title was concerned.

The case of Carondelet vs. St. Louis, 25 Mo. R., 448, (already referred to,) is strong on the same point.

So also to the same effect is the case of Funkhouser vs. Langkopf, 26 Mo. R., 453. In this case the Court holds that the Statute of Limitation runs against the confirmees, by the act of the 13th of June, 1812, from the date of the passage of the act.

And the case of Guitard vs. Stoddard, 16 How., 510, shows that the Supreme Court of the U. S. entertain the same views of the effect of the act of 1812.

To the same effect also is the case of Savignac vs. Garrison, 18 How., 136.

The Hunt Records, then, were offered by the defendant, not to prove a title of a date subsequent to that of the plaintiffs, but long anterior to it. They were, therefore, legal and competent evidence against the plaintiffs. If these records tended to prove a title posterior in date to that of the plaintiffs, they might not have been competent evidence against the plaintiffs. And this is the utmost of the extent to which any decided case has gone.

Only to this extent did the Court go in the case of Lessieur vs. Price, 12 How., 59.

In 1824 the Congress of the United States says, by a statute law, what shall be sufficient evidence to its grantees of the title granted by it to them in 1812. This it was competent for Congress to do. It takes no right away from the plaintiffs to the land sued for; it, in no wise, interferes or affects any right of the plaintiffs. For long before 1820, the date of the inception of plaintiffs' claim, the United States had divested all title to the land out of itself, and invested it in Faustin, so that, at that date, the Government had no title, and, of course, could give none to the State of Missouri. The plaintiffs then, never having had any title or claim to the land, as against Faustin, have no right to complain of the act of 1824, because they had no interest in the land that could be injured or affected by it.

And the title to the land being in Faustin, and the plaintiffs having no interest in, or claim to it, there was no obligation upon him to give them, or any one under whom they claim, any notice of his proceedings before the Recorder. The act of 1824 required no notice to be given by the claimants.

In the case of Guitard vs. Stoddard, 16 How., 494, this Court has decided that it is competent for the defendant to prove by living witnesses, the cultivation or possession of the lot by Faustin, notwithstanding the title of the plaintiff incepted in 1820. And yet, in such case, the proof would have been made after the vesting of the title claimed by the plaintiffs, as much as it was in this case. In both cases the facts proved are not such as transpired at the date of the proof, but which existed prior to the 20th of December, 1803. And whenever these facts were proved, the evidence showed that a title was vested in the claimant by the act of the 13th of June, 1812.

Again: undoubtedly this Court will recognize the authority of Congress, to determine how a fact may be proved, or, in other words, determine what shall be evidence of a given fact in the Courts of the United States.

The act of the 15th of February, [1811, reserving the sixteenth section of each township for the use of schools, can have no bearing on this case, because the title to the sixteenth section being retained in the United States, the Congress might, at any time thereafter, grant it to any grantee it might see fit. And this is just what Congress did do by the act of 1812; it granted it to the parties enumerated in the first section of the act.

XIII. Upon the political point made in the case by the plaintiffs, when objecting to defendant's evidence, I remark, that the question attempted to be raised, is precluded by the facts of the case. There is no attempt, by the United States, to invade the sovereignty or jurisdiction of the State of Missouri. Congress has not attempted to make anything evidence in violation or in opposition to the laws of Missouri, nor even to make anything evidence which is not also made evidence by the laws of Missouri. On the contrary, these very records under consideration, are expressly made evidence by an act of the Legislature of that State.

See act of 1855, p. 724, § 8.

What has the Government done in the premises? Congress has granted, by an act of 1812, lands to the inhabitants of certain towns, mentioned in the act. Afterwards, the same grantor, by an act of 1824, makes it the duty of these inhabitants to come before the Recorder of Land Titles, an officer of the Government, and designate their lots, by the proof, and in the mode indicated in the act; and the duty of the Recorder to grant a certificate of confirmation of the lots so designated, and of the Surveyor General to survey them, and so distinguish them from the vacant lots. This is all. The act does not say, does not assume to say, that the records so made shall be evidence in the Courts of Missouri, in spite of the laws of the sovereign State of Missouri. By no means. But that State has said by her statutes, that these records shall be competent evidence.

XIV. But the act of 1820, under which plaintiffs claimed, expressly states, that Congress proposes to grant to the State of Missouri, the sixteenth section, *only* where the same had not been sold or otherwise disposed of. and in that case other lands equivalent thereto, and as contiguous as may be.

So that Faustin's common-field lot, having being confirmed to him by the act of the 13th of June, 1812, is expressly excepted from the proposal made by Congress to that State, and is not granted. These plaintiffs, therefore, stand in no attitude to set up a claim to this land against Faustin. Under the compact they have no right to recover or to claim his land, but they have a right to get "other land equivalent thereto." The very title paper, under which they claim, excepts Faustin's lot from its operation.

T. Polk

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SUPREME COURT OF THE UNITED STATES.

No. 41.—December Term, 1861.

WILLIAM GLASGOW, JR., AND WILLIAM C. TAYLOR, SURVIVING COMMISSIONERS OF THE 16th SECTION, IN TOWNSHIP 45 NORTH, OF RANGE 7 EAST, PLAINTIFFS IN ERROR,

vs.

JOHN B. HORTIZ, (UNDER FRANCIS BEQUETTE,) DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF MISSOURI.

Statement and Brief.

By BRITTON A. HILL,

OF COUNSEL FOR DEFENDANT IN ERROR.

The Spanish village of St. Louis, settled in 1764, situate on the right bank of the Mississippi, about twenty miles below the mouth of the Missouri, was a walled town, embracing a small tract of land within the fortifications, which extended nearly one mile in length on the river by one-fourth of a mile in width.

Adjoining and belonging to the walled town were out-lots, common-field lots, and commons. The field lots were cultivated by the villagers, whose habitations were within the walls.

The common-field lots were narrow strips of land, varying from sixty-four to one hundred and ninety-two yards in width, with a depth of about one mile and a half, having a common line in front; and each lot was marked by lines of cultivation and corner stones,

Geo. S. Gideon, printer, 511 Ninth street, Washington.

planted in Spanish times. "These lots were granted or surveyed in succession, each being bounded on a lot previously granted; and so the common field was capable of indefinite extension, and each survey, when made, was the survey of a single lot." (Opinion of Mr. Chief Justice Gamble, in *Harrison vs. Page*, 16 Mis., 206; see, also, opinion of Mr. Justice Napton, in *Page vs. Scheibel,* 11 Mo., 182–3.)

Wherever these field-lots fronted on the commons, belonging to the town, the fronts were fenced by the individual proprietors, so that the commons were enclosed. (*Page vs. Scheibel,* 11 Mo., 175.)

The premises sued for by plaintiffs, for the schools, are situate within the common fields of the Grand Prairie, belonging to St. Louis; and the defendant Hortiz, under Francis Bequette, claims the same land as part of a common-field lot, cultivated by Bequette before 1803, according to its lines, land-marks, and survey under Spanish authority, (11 Mo., 183,) and confirmed to Bequette by absolute grant from Congress, on the 13th of June, 1812, according to his ancient possession and cultivation.

Plaintiffs, as commissioners for section sixteen, in township 45, claim this same land granted to Bequette in 1812, under the propositions contained in the act of 6th of March, 1820, known as the Missouri Compromise act, which proposed: "That section numbered sixteen in every township—and when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be—shall be granted to the State, for the use of the inhabitants of such township, for the use of schools."

By ordinance of the State of Missouri, of the 19th July, 1820, the propositions of the compromise act were accepted, and the grant took effect for every sixteenth section not sold or otherwise disposed of.

The town of St. Louis was incorporated under the act of 1808, Terr. Laws, vol. 1, p. 185, which provided as follows: "It shall be lawful for the inhabitants of any town or village within this territory, or two-thirds of them, who are desirous to establish within said town a police, for their legal government, or for the preservation and regulation of *any commons appertaining thereto,* to present their petition for that purpose to the court of common pleas of the district wherein such town or village is situated, stating therein *the metes and bounds of the said town and commons;* whereupon it shall be the duty of the court, &c., * * * to declare the said town or village incorporated under this act, and to order *the metes and bounds stated in such petition to be surveyed and marked,* and a plat thereof to be filed of record in the clerk's office."

On the 9th day of November, 1809, the town of St. Louis, including the commons, was incorporated by order of the court of common pleas, "commencing at Roy's tower, (1275 feet north of

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the *demi line* in the north wall of the town,) on the bank of the Mississippi; thence running sixty arpens west; thence south, on said line of sixty arpens in the rear, until it comes to the sugar loaf; thence due east to the Mississippi; from thence, by the Mississippi, to the place first mentioned." A survey of these metes and bounds was made, and a plat thereof filed of record. (See record in Kissell vs. The Schools and Carondelet vs. St. Louis.).

This act of incorporation, and the survey thereof, properly made in 1820, excluded all the northern portion of the St. Louis common fields—the whole of the Grand Prairie common fields, the *Cul de Sac* common fields, and the *Barriere des Noyers* common fields; all adjoining and belonging to the town of St Louis in 1803 and 1812. The tiers of common fields on the west of the said town, excluded by said incorporation, were about five and a half miles long by forty arpens in width, and are now in part within the city of St. Louis, and actually possessed by a great number of persons, and are of the value of many millions of dollars.

On the 13th of June, 1812, the town and commons, and a portion of one tier of the common fields, being included in the corporate limits of St. Louis, Congress passed an act as follows:

SEC. 1. Be it, &c., "That the rights, titles, and claims to town or village lots, out-lots, common-field lots, and commons *in*, *adjoining*, *and belonging* to the several towns or villages of * * * St. Louis, &c., * * in the Territory of Missouri, which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, *and the same are hereby*, *confirmed* to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." * * The act provided for a survey of out-boundary lines, "so as to include the out-lots, common-field lots, and commons thereto respectively belonging."

Surveys were made of the common fields of the Barriere des Noyers, of the St. Louis common fields, and of a portion of the Cul de Sac fields, and of the Grand Prairie common-fields of St. Louis as early as 1820, and a township plat was returned.

In 1840 out-boundary lines were constructed in the surveyor general's office at St. Louis, so as to exclude the Grand Prairie common fields, the Cul de Sac common fields, and the Barriere des Noyers common fields. These lines were established in order to designate the reservations of vacant lands and lots within such lines, for the use of schools of the town of St. Louis, under the second section of the act of 13th June, 1812. (See *Kissell vs. Schools*, 18 How., p. 25.)

The plaintiffs in error claim that the marking and platting of the out-boundary lines of St. Louis in 1840 annulled all the grants of 1812 in the grand tiers of common fields of St. Louis lying outside of said out boundary lines.

BRIEF.

1st. The confirmation to Francis Bequette, under the act of Congress of 13th June, 1812, vested a perfect title in Bequette on that day to the common-field lot in the *Grand Prairie* common fields of St. Louis, *according to the limits of the field-lot cultivated by him,* prior to the 20th day of December, 1803, without any condition of survey by the United States, without any evidence of formal or written grant or survey under the Spanish government, and without any other requirement or condition to be done or performed by any officer of the United States, as solemnly decided by the courts of Missouri for forty years, and approved by this court in 1834 and 1853—

Vasseur vs. Benton, 1 Mo., 212, (1823;) *Lajoye vs. Primm*, 3 Mo., 368; *United States vs. Percheman*, 7 Peters, 51; *Strother vs. Lucas*, 12 Peters, 410; *Janis vs. Gruno*, 4 Mo., 458; *Gruno vs. Janis*, 6 Mo., 330; *Trotter vs. St. Louis Public Schools*, 9 *ib.*, 69; *Biehler vs. Coonce*, *ib.*, 347; *Machlot vs. Dubrenil*, *ib.*, 477; *Montgomery vs. Landusky*, *ib.*, 705; *Page vs. Scheibel*, 11 Mo., 167; *Harrison vs. Page*, 16 Mo., 182; *Kissell vs. Schools*, *ib.*, 553; *Gamache vs. Piquinot*, 17 Mo., 310; *Soulard vs. Clarke*, 19 Mo., 570; *Carondelet vs. McPherson*, 20 Mo., 198; *City of St. Louis vs Toney*, 21 Mo., 243; *Gamache vs. Piquinot*, 16 How., 451; *West vs. Cochran*, 17 How., 416; *Kissell vs. The Schools*, 18 How., 25; *Carondelet vs. St. Louis*, 25 Mo., 459; *Milburn vs. Hortez*, 23 Mo , 536; *Schultz vs. Lindell*, 24 Mo., 568; *Funkhouser vs. Langkopf*, 26 Mo., 458–9; *Mackay vs. Dillon*, 4 Howard, 454.

2d. A complete grant *in presenti* having been made by Congress to Bequette in 1812 of this common-field lot, according to the possession which had defined limits on the ground, there could not be any legal grant of the same land by Congress to the use of schools in township 45 in 1820—for this lot had been otherwise disposed of, and an ample reservation had been already made for the use of schools in township 45, embracing St. Louis—by the 2d section of the act
he act of 1820, provides "that when the 16th section
old or otherwise disposed of, other lands equivalent
l as contiguous as may be, shall be granted, &c."

latting and marking on the official map of township
out-boundary lines of St. Louis by the surveyor gen-
, so as to exclude the grand tiers of common-field lots
of the old town and commons from such out-boundary,
ate to divest or annul all or any one of the grants of
r any one of the field-lots adjoining and belonging to
t. Louis in 1803 and 1812—

Page vs. Scheibel, 11 Mo., 167; *Harrison vs. Page*, 16 Mo., 182; *Soulard vs. Clarke*, 580. 19 Mo D

4th. The persons confirmed in their rights, titles, or claims to the common-field lots situate outside of the out-boundary, platted in 1840, were not parties or privies to the out-boundary survey, and were not bound or estopped by it from claiming, according to the grant made to them in 1812.

5th. The platting of the out-boundary lines in 1840 was not intended to be a survey of any confirmations of field-lots in any one of the tiers of common fields of St. Louis. None of the confirmees of field-lots have ever acccepted said survey or platting of the out-boundary lines as a survey of any confirmation to them, and it is not in any way connected with them, or with their confirmations.

The out-boundary lines were platted for the sole purpose of fixing the limits of the reservation for the use of schools, under the 2d section of the act of 1812; for, until such line was established, the reservation for schools was void for uncertainty. (*Millburn vs. Hortiz*, 23 *Mo.*, 536; *Kissell vs. The Schools*, 18 *How.*, 25.)

6th. The running of out-boundary lines, under the act of 13th of June, 1812, was not a condition annexed to the confirmations to individual owners, and could not limit or affect them.

The confirmations of village lots, out-lots, common field-lots, and commons, were all absolute, according to the metes and bounds of ancient possession, inhabitation, or cultivation, and took effect *in presenti*, as complete grants.

The lines ordered by the act to be run are required to include all the confirmations. The grants are not made for lots within lines to be run, but are wholly independent of all conditions, and the titles of individual owners, vested absolutely before the surveyor, was required to run an out-boundary.

If the previous confirmations had been designed to be subjected to the condition of survey, the grant would have been of all lots included within the out-boundary.

While the act effectually limits the reservation for the schools to the lands not owned by private persons *within the out-boundary lines as surveyed*, it carefully excludes the village lots, out-lots, common field-lots, and commons, granted to individuals from such condition of survey by making the confirmations absolute, according to possession, and not according to surveys. (*Trotter vs. The Schools*, 9 *Mo.*, 831.)

7th. The bounds of the village and commons in 1812, according to the record of incorporation of 1809, notoriously excluded the grand tiers of common fields adjoining and belonging to the town; and we find that the act of 1812 grants the lots by three descriptions, designed to cover every one of the lots inhabited, possessed, or cultivated.

First. The act grants all the lots *in* the town. *Second*. All the lots *adjoining* the town. *Third*. all the lots *belonging* to the town.

The village of St. Louis was then surrounded by an *out-boundary* which run from Roy's tower, one-fourth of a mile north of the Spanish wall, to a point sixty arpens west; and thence south along the east line of the *Barriere des Noyers* common fields to a point opposite the Sugar Loaf; and thence east to the Sugar Loaf; and thence north along the river to the tower of Roy. By this record of incorporation, all the village lots and commons, and a small number of the St. Louis common fields, were *in* the town; the Barriere des Noyers field-lots were *adjoining* the town; and the Grand Prairie and the northern part of the St. Louis common fields did not *adjoin*, but *belonged* to the town.

The act of 1812 was evidently drawn to make absolute grants to individuals, according to their possession or cultivation, of the three different descriptions of lots in, adjoining, and belonging to St. Louis at the time the act was passed; and the grants are as absolute for the lots *adjoining* and *belonging* to the town, as for the lots *in* the town.

This has been the construction uniformly given to the act by the supreme court of Missouri since 1823; and this court has approved that construction in *Guitard vs. Stoddard*, 16 *How.*, and *West vs. Cochran*, 17 *How.*, 416.

8th. The effect of United States surveys upon confirmations depends on the nature of the grant or confirmation.

If the grant is absolute, it controls all surveys; if the grant is not absolute, and the confirmation is of an unlocated tract of land, to be surveyed in satisfaction of the grant, the survey becomes a part of the grant, and the confirmee must take according to the survey, for he has no title until the location.

The act of 3d March, 1807, did not grant proprio vigore. (*Burgess vs. Gray*, 16 *How.*, 48; *West vs. Cochran*, 17 *How.*, 416; and *Staniford vs. Taylor*, 18 *How.*)

It was held by this court in these cases, in accordance with the doctrine declared in *Menard's Heirs vs. Massey*, 8 Howard, 311, that Congress did not intend that a final legal title, as against the United States, should be made to *vague grants*, until their bounds had been ascertained by survey; that the grant under that act not being absolute, passed only an equitable right to be located, and the power was *reserved* to survey the confirmations that had not been previously surveyed under the Spanish government. (See *West vs. Cochran*, 17 How., 415–16.)

In the case of *West vs. Cochran*, the precise distinction was drawn between the relative effect of surveys, under the act of 1807 and the act of 1812, and while the court held the survey of Brazeau's indefinite confirmation, under the act of 1807, to be conclusive of location, care was taken to distinguish the case from confirmations under the act of 1812, which were held to be independent of surveys, and to depend upon the proof of ancient possession, as a fact to be tried by a jury, "as to what the plaintiff did formerly possess, and consequently own." (17 How., 415–16.)

So in *Staniford vs. Taylor*, 18 How., 412, where the survey had been made of an indefinite confirmation, under the act of 1807, this court held: "The law is settled, that where there is a specific tract of land confirmed, according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment." As the confirmation was for a vague tract of land, the court held the survey a part of the grant, and conclusive of location.

In the case of *Kissell vs. The St. Louis Public Schools*, 18 How., 25, it was held that the school reservation was subject to the condition of survey; and *West vs. Cochran*, 17 How., 413, is cited as laying down the dividing line between the executive and judicial powers in such cases.

9th. By the rule adopted in the leading cases of *Guitard vs. Stoddard*, and *West vs. Cochran*, the grants to individuals under the act of 1812 are absolute, without condition of survey, and the confirmee has a right to sue upon the grant, and locate the land granted by proof of possession or cultivation, as a fact before a jury.

The reason of the rule is, that when the United States grants an absolute fee in a field-lot to A in 1812, according to A's possession in 1803, a surveyor, platting lines in a Government office in 1840, cannot transfer the title of A to B by making erroneous lines of survey on a township plat. Congress alone can grant the public domain; and when the grant takes effect *in presenti*, as in this case, for a specific lot, surveyors, commissioners, secretaries, and Congress united, cannot divest the title of the confirmee.

10th. The power of the Executive Department over the grant ceases the moment the title passes for a specific tract of land. The judicial power of the courts takes exclusive jurisdiction of the respective rights of grantees, whose titles have vested *in presenti* by congressional grants, or by patents under the great seal. This is the law, as settled by the cases of *Mackay vs. Dillon*, 4 How., and *West vs. Cochran*, 17 How.

The congressional grant of 13th June, 1812, vesting the title, is a higher evidence of title than a patent. (*Strother vs. Lucas*, 12 Peters, 443, 454; *Guitard vs. Stoddard*, 16 How; *Stoddard vs. Chambers*, 2 How., 318; *Grignons Lessees vs. Astor*, 2 How., 344.)

11th. If a patent had issued for this lot in the Grand Prairie common fields, it would have been beyond the power or control of the officers of the United States. (*Lott vs. Pnidhomme*, 3 Rob. La., 293.)

"Where the United States has parted with its title by patent legally issued, &c., the title so granted cannot be impaired by any subsequent survey which the Government may make for its own purposes." (*Coge vs. Danks*, 13 Annual La. Rep., 128.)

The same rule that applies to patents, applies with equal force to absolute congressional grants; and when the fee passes by either form of grant, the courts alone have jurisdiction over the titles claimed under the patents or the grants. (*Mackay vs. Dillon*, and *West vs. Cochran*, supra.)

12th. The act of 1812 required the out-boundary lines to be run, so as to include all the field-lots; but the failure of the public officers to run such lines and mark them, cannot devest titles to lots already vested in individuals. The presumption of law is, that whatever ought to be done has been done; and the courts are authorized to presume that the out-boundary lines have been run, in compliance with the law.

In the interpretation of statutes, a vested right ought not to be destroyed by implication. (*Soulard vs. Clark*, 19 Mo., 581.)

13th. The title of the defendant to his common-field lot was, therefore, perfect on the 13th of June, 1812, by absolute grant, located by ancient surveys, land-marks, and possession; it has been maintained by the courts of Missouri for half a century as a title in fee simple, absolute without a survey, without condition, limitation, exception, or reservation; and this court, in *Guitard vs. Stoddard*, 16 Howard, after the most elaborate examination and investigation, has solemnly affirmed the decisions of the courts of Missouri. The title having vested in Bequette for this specific lot in 1812, the control of the Executive Department of the Government over the title ceased, and the judicial power of the courts alone could take cognizance of controversies between parties claiming title under such grants. In this case the plaintiffs invoke a grant of 1820, and a platting of a line by a surveyor in 1840, to devest a title granted to Bequette in 1812; and the courts have held that Congress, having granted the land absolutely in 1812 to Bequette, no subsequent action of Congress or of the land department could devest the title. With or without a survey, and against all fraudulent or erroneous surveys by any officers of the United States, the grantee can recover before a court of justice upon his congressional grant for the specific lot cultivated by him before 1803, and guarantied to him by the treaty of Paris.

The grantee, with his title perfected and his testimony perpetuated, is not compelled to prosecute protests against all or any of the fraudulent or erroneous surveys made for the benefit of various classes of land pirates during fifty years. The grant being made for the field-lot, the title is under the protection of the law. Clerks in Washington or in St. Louis cannot destroy the title papers and annul the grant by platting lines in their offices on the maps of public or private surveys. The grantee is entitled to a ~~tract~~ trial under the forms of law before a jury in open court, and to be heard by counsel. The power of government officers over the title ceased with the grant, and the courts alone can determine who is lawfully entitled thereto.

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